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# Re-framing the Alien Tort Act after *Kadic v. Karadzic*

## **Cover Page Footnote**

International Law; Commercial Law; Law

## Re-framing the Alien Tort Act After *Kadic v. Karadzic*

### I. Introduction

As international human rights have moved to the forefront of international law, the role of the federal judiciary in asserting jurisdiction over such claims has become increasingly important.<sup>1</sup> When federal courts probe the activities of foreign countries and attempt to hold their leaders accountable, United States foreign policy is directly implicated.<sup>2</sup> In light of these situations, courts should have express authority from Congress.

For 200 years, that authority has been the Alien Tort Act,<sup>3</sup> though federal courts have yet to consistently define its scope. With no additional clarification from either Congress or the Supreme Court, federal courts have had the challenge of interpreting the Alien Tort Act in the context of modern international law.<sup>4</sup> Since 1980, the courts have used the Alien Tort Act to assert their right to hear claims arising out of the basements of Paraguay<sup>5</sup> and the torture chambers of the Philippines.<sup>6</sup>

Just recently, the Second Circuit used the Alien Tort Act to assert jurisdiction over the events pertaining to ethnic cleansing in Bosnia.<sup>7</sup> The alleged acts of genocide and war crimes are reminiscent of the Nazi death camps during World War Two.<sup>8</sup> The Second Circuit held that a district court in Manhattan had subject-matter jurisdiction over Radovan Karadzic, alleged author of these atrocities.<sup>9</sup> The court ruled that Karadzic could be held liable for acts of war crimes and genocide even if he was not considered a "state actor" when he committed such acts.<sup>10</sup> The decision to extend liability for these violations broadened the scope of the Alien Tort Act, the revival of a cause that had been spearheaded over a decade and a half ago by the Second Circuit in

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<sup>1</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980); Jefferey M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Irala*, 22 HARV. INT'L. L.J. 53 (1981); William R. Castro, *Federal Courts Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467 (1986).

<sup>2</sup> Castro, *supra* note 1, at 484.

<sup>3</sup> 28 U.S.C. § 1350 (1988). For purposes of simplicity and consistency within this Note, I will refer to this statute simply as the "Alien Tort Act" or "§ 1350."

<sup>4</sup> See, e.g., *Filartiga*, 630 F.2d 876 (2d Cir. 1980).

<sup>5</sup> *Id.*

<sup>6</sup> See *In re Estate of Ferdinand Marcos Human Rights Litigation*, 978 F.2d 493 (9th Cir. 1992).

<sup>7</sup> *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), *reh'g denied*, 74 F.3d 377 (2d Cir. 1996).

<sup>8</sup> See *infra* note 25.

<sup>9</sup> *Kadic*, 70 F.3d at 238-46.

<sup>10</sup> *Id.* at 244-45.

*Filartiga v. Pena-Irala*.<sup>11</sup>

This Note will begin by exploring the facts and procedural history of the *Kadic* and *Doe* cases in Part II.<sup>12</sup> Part III will explore the historical origins of the Alien Tort Act and examine its recent evolution in the federal courts.<sup>13</sup> Part III will also examine the historical role of non-state actor liability under the law of nations.<sup>14</sup> Part IV provides an analysis of the *Kadic* cases and centers on two important questions.<sup>15</sup> The first is whether non-state actors may be held liable for war crimes and genocide under the law of nations.<sup>16</sup> The second is whether the Alien Tort Act is the proper vehicle for a federal court to assert jurisdiction over claims which occur outside the United States and do not involve United States citizens.<sup>17</sup> Finally, this Note will briefly address a more pressing concern—how the practical complexities of such jurisdiction might threaten the integrity of United States courts throughout the world.<sup>18</sup>

## II. Statement of the Case

### A. Background of Events

The atrocities alleged by the plaintiffs in the *Kadic* cases arise out of the hostilities that have plagued the former Yugoslavia since 1991. On March 3, 1992, the Croats and Muslims in that area proclaimed their independence as Bosnia-Herzegovina by a popular referendum.<sup>19</sup> Bosnian Serbs boycotted the referendum and formed a self-proclaimed Serbian "state" within Bosnian territory.<sup>20</sup> On April 6, war broke out between the Bosnian government and the rebel Serbs, just when the European Union recognized Bosnia's independence.<sup>21</sup> The war pitted the several ethnic factions against one another and escalated into a full-blown civil war, capturing the attention of the world.

Radovan Karadzic was an influential political and military leader of the rebel Serb state known as "Srpska," which "exercises actual control over large parts of the territory of Bosnia-Herzegovina."<sup>22</sup> He headed a tripartite presidency of Srpska and was also the military

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<sup>11</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>12</sup> See *infra* notes 19-65 and accompanying text.

<sup>13</sup> See *infra* notes 66-135 and accompanying text.

<sup>14</sup> See *infra* notes 136-60 and accompanying text.

<sup>15</sup> See *infra* notes 161-239 and accompanying text.

<sup>16</sup> See *infra* notes 164-204 and accompanying text.

<sup>17</sup> See *infra* notes 205-32 and accompanying text.

<sup>18</sup> See *infra* notes 232-39 and accompanying text.

<sup>19</sup> *A Long Road to Peace*, WASH. POST, Nov. 22, 1995, at A22. Other chronologies point to February 29, 1992 as the date that Bosnia-Herzegovina declared its independence. See, e.g., *Chronology of Bosnia War*, N.Y. TIMES, February 6, 1994, at A12.

<sup>20</sup> *A Long Road to Peace*, *supra* note 19, at A22.

<sup>21</sup> *Id.*

<sup>22</sup> *Kadic v. Karadzic*, 70 F.3d 232, 237 (2d Cir. 1995).

leader of the warring Serbian forces, who allegedly caused many of the internationally-recognized atrocities.<sup>23</sup>

In 1993, as the war intensified, two groups of similarly situated plaintiffs filed class action suits against Karadzic in the United States District Court for the Southern District of New York in Manhattan.<sup>24</sup> The plaintiffs alleged that Karadzic committed numerous human rights violations against them as President of Srpska and as commander of the Serbian rebel forces.<sup>25</sup> Specifically, they alleged that they were the victims of a genocidal campaign waged by Serbian forces under Karadzic's direction.<sup>26</sup> The plaintiffs sought compensatory and punitive damages as well as attorneys' fees and injunctive relief.<sup>27</sup> Service of process proved difficult for the plaintiffs, but they finally served Karadzic while he was in New York as an invitee of the United Nations, accompanied by a Special Agent of the Diplomatic Security Service of the United Nations.<sup>28</sup>

### B. *The District Court's Opinion*

On September 7, 1994, United States District Court Judge Peter K. Leisure dismissed the lawsuits for lack of subject matter jurisdiction.<sup>29</sup> Plaintiffs had sought subject matter jurisdiction under the Alien Tort Act,<sup>30</sup> an antiquated alienage jurisdiction statute which was originally promulgated in 1789 as part of the first Judiciary Act.<sup>31</sup>

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<sup>23</sup> *Id.*

<sup>24</sup> *Doe v. Karadzic*, 866 F. Supp. 734, 735-36 (S.D.N.Y. 1994).

<sup>25</sup> *Id.* The two lawsuits began separately. The first class of plaintiffs, the "Doe" plaintiffs, filed their complaint on February 11, 1993, alleging rape, torture, and summary execution. The class covered thousands of plaintiffs who were allegedly subjected to systematic forms of "ethnic cleansing." *Id.* The Doe complaint was the product of Yale Law School's Allard K. Lowenstein International Human Rights Clinic. It was briefed by Yale Law School professor Harold Hongju Ko and Ronald C. Slye (who are the clinic's directors) and 11 students. Thomas Scheffey, *No Place to Hide*, CONN. L. TRIB., November 6, 1995, at 1. The second class action was filed by S. Kadic. It alleged similar human rights violations such as massacres, forced detention and pillage, and Kadic alleges that she was, in fact, raped. *Kadic*, at 736-37. Feminist legal theorist Catharine A. MacKinnon, of the University of Michigan School of Law, brought the Kadic action and was aided by the National Organization for Women. Scheffey, *supra* at 1.

<sup>26</sup> *Doe*, 866 F. Supp. at 735-36.

<sup>27</sup> *Kadic*, 70 F.3d at 237. Only the Kadic case sought injunctive relief against continued war crimes.

<sup>28</sup> *Id.* Though Karadzic admits that he was served, there was genuine concern for whether service was proper in either case. *Doe*, 866 F. Supp. at 737. In the *Doe* case, there were conflicting affidavits as to whether the agent of the court had gotten close enough to Karadzic to deliver the papers, but it is undisputed that the agent exclaimed, "You have been served," as he attempted the delivery. *Id.* at 737-38. In the *Kadic* case, the court granted a motion for service through alternate means, as Karadzic was deemed served when a U.S. Marshal presented a copy of the summons and complaint to Special Agent Diebler, a member of State Department's security detail assigned to Karadzic. *Id.*

<sup>29</sup> *Doe*, 866 F. Supp. at 734.

<sup>30</sup> 28 U.S.C. § 1350 (1988).

<sup>31</sup> Judiciary Act, ch. 20, § 9, 1 Stat. 73, 77 (1789) (28 U.S.C. § 1350).

They also sought relief under the Torture Victim Protection Act (TVPA) and the federal question statute.<sup>32</sup>

Judge Leisure held that jurisdiction was improper under the Alien Tort Act because Karadzic was a private actor, and that the law of nations<sup>33</sup> does not impose duties on private persons or "non-state actors."<sup>34</sup> Judge Leisure based his decision largely on *Filartiga v. Pena-Irala*,<sup>35</sup> which held that torture is a violation of the law of nations when committed by public officials.<sup>36</sup> He found additional support in later cases, most explicitly in *Tel-Oren v. Libyan Arab Republic*,<sup>37</sup> where the D.C. Circuit Court of Appeals affirmed the dismissal of an action brought against the Palestine Liberation Organization by survivors of a PLO terrorist attack.<sup>38</sup> Thus, Judge Leisure concluded that, "the acts alleged in the instant action, while grossly repugnant, cannot be remedied through 28 U.S.C. § 1350."<sup>39</sup> Judge Edwards, writing one of three concurring opinions,<sup>40</sup> argued that extending jurisdiction to non-state actors "would require this court to venture out of the comfortable realm of established international law . . . in which states are the actors."<sup>41</sup>

Judge Leisure also recognized the possibility that the executive

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<sup>32</sup> 28 U.S.C. § 1331 (1994).

<sup>33</sup> Because much of this Note refers to historical evolution of the Alien Tort Act, the original term "law of nations" will be used whenever possible, instead of "international law" when describing the types of violations under the Alien Tort Act.

<sup>34</sup> *Doe v. Karadzic*, 866 F. Supp. 734, 739-40 (S.D.N.Y. 1994).

<sup>35</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>36</sup> *Id.* at 884-85.

<sup>37</sup> 726 F.2d 774 (D.C. Cir. 1984).

<sup>38</sup> *Id.* at 775.

<sup>39</sup> *Doe v. Karadzic*, 866 F. Supp. 734, 740-41 (S.D.N.Y. 1994). The court also declined jurisdiction under the TVPA, since the 1992 law specifically requires that a violation be committed under the authority, or color of authority, of a foreign nation. *Id.* at 741-42. As to the federal question jurisdiction, Judge Leisure refused to find an implied right of action under 28 U.S.C. § 1331: "This Court declines to find an implied right of action arising under the law of nations, specifically in view of the fact that Congress has addressed the matter and created two express causes of action . . ." *Id.* at 743.

<sup>40</sup> *Id.* All three concurring judges on the appellate panel dismissed the case on vastly different grounds. Judge Edwards relied on *Filartiga*, but declined to extend it to non-state actors, and gave an exhaustive historical analysis on the various interpretations of the Alien Tort Statute since its enactment in 1789. He agreed with *Filartiga*'s extension of the statute to remedy modern-day violations of the law of nations, but ultimately articulated an alternative standard for determining liability. Judge Edwards believed that his formulation was closer to the original intent of the statute by requiring that § 1350 claims include a domestic violation that also violates international law. In these cases, the domestic law provides the applicable standard for determining liability. *Id.* at 775-84 (Edwards, J., concurring). Judge Bork's opinion disapproved of *Filartiga*'s reasoning and stated that the Alien Tort Act was essentially a dead letter since it did not provide a cause of action and it was intended to cover only the three original violations as enumerated by Blackstone: piracy, safe passage, and the slave trade. *Id.* at 798-820 (Bork, J., concurring). Judge Robb wrote the shortest opinion of the three, dismissing the action on grounds of "nonjusticiability." *Id.* at 824-29 (Robb, J., concurring).

<sup>41</sup> *Id.* at 792. (Edwards, J., concurring).

branch may eventually recognize Karadzic as an official head of state.<sup>42</sup> Karadzic could then claim immunity under the head of state doctrine or the Foreign Sovereign Immunities Act (FSIA).<sup>43</sup> In this event, plaintiff's claims would turn into advisory opinions for which no justiciable controversy exists.<sup>44</sup> Judge Leisure ruled that this unique possibility, while not "dispositive at this point in the litigation, militates against this Court exercising jurisdiction."<sup>45</sup>

### C. *The Second Circuit Reverses*

The Second Circuit disagreed with Judge Leisure's reasoning and reversed, holding that subject matter jurisdiction was proper under the Alien Tort Act.<sup>46</sup> Judge John O. Newman, writing for the three-judge panel, held that "certain forms of conduct violate the law of nations whether undertaken by those acting under auspices of a state or only as private individuals."<sup>47</sup>

The court believed that Judge Leisure's analysis of the state-action requirement focused only on claims of torture.<sup>48</sup> According to the court, certain violations of the law of nations are considered universal acts for which individuals, or "non-state actors," may be held liable.<sup>49</sup> Historically, these crimes included piracy and slave trading, but the court ruled that the list had been extended to include war crimes and genocide.<sup>50</sup> While the court noted that torture violations do require state action, it suggested that most of the acts of torture were committed during Karadzic's alleged campaign of "ethnic cleansing" and were, therefore, already incorporated into the plaintiffs' claims of genocide and war crimes.<sup>51</sup>

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<sup>42</sup> *Doe*, 866 F. Supp. at 738.

<sup>43</sup> *Id.* FSIA is codified at 28 U.S.C. § 1603(b)(2) (1988).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995).

<sup>47</sup> *Id.* at 239.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 239-40. In extending war crimes and genocide to this list of international law violations attributable to private actors, the court relied on a wide array of sources. One was a Statement of the Interest of the United States, filed by United States Solicitor General Drew Days, which restated the Executive Branch's position that private persons can be sued under the Alien Tort Act for war crimes and genocide. *Id.* at 239-40. The *Kadic* court also looked to the Restatement of Foreign Relations Law of the United States and even Judge Edwards' opinion in *Tel-Oren*, for additional support. *Id.* The court read Judge Edwards' state action requirement as applying only to torture violations, noting that Edwards' acknowledged that there exists, "a handful of crimes to which the law of nations attributes individual responsibility." *Id.* at 240 (citing *Tel-Oren v. Libyan Arab Republic*, 726 F.2d at 795 (D.C. Cir. 1985) (Edwards, J., concurring)).

<sup>51</sup> *Kadic*, 70 F.3d at 244-45. Of course, if Karadzic is considered a state actor, then the allegations of torture alone will be sufficient to assert jurisdiction. 28 U.S.C. § 1350 (1992); *Filariga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). The court grouped the alleged atrocities into three groups, genocide, war crimes and torture, to determine whether the offenses

The court then addressed the state action requirement for law of nations violations and posited that Karadzic may, in fact, be a state actor.<sup>52</sup> Under international law, a "state," is defined as "an entity that has a defined territory, and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other entities."<sup>53</sup> Although, Srpska had not been recognized by the United States government, "[t]he customary international law of human rights, such as the proscription of official torture, applies to states without distinction between recognized and unrecognized states."<sup>54</sup>

The Second Circuit's opinion also recognized a potential loophole that would result from holding only "recognized" states liable for international law violations.<sup>55</sup> If the United States refused to recognize a rebel state for foreign relations purposes, that non-recognition could be used to shield the rebel government from "state actor" liability for violations of the law of nations.<sup>56</sup> Official recognition by the United States, on the other hand, might trigger other shields from liability, such as the Foreign Sovereign Immunities Act<sup>57</sup> or the act of state doctrine.<sup>58</sup> Thus, a requirement that only recognized states can be liable for law of nations violations may have the perverse effect of creating a permanent shield from liability.<sup>59</sup> Finally, the court held that service was not barred by the United Nations Headquarters Agreement,<sup>60</sup> and that the case was not barred by the "political question" doctrine.<sup>61</sup>

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alleged violated the law of nations. The court conceded that it was too early in the litigation process to determine whether the appellants would be able to prove the requisite elements of genocide or war crimes. *Kadic*, 70 F.3d at 244.

<sup>52</sup> *Kadic*, 70 F.3d at 244-45.

<sup>53</sup> *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1986)).

<sup>54</sup> *Kadic*, 70 F.3d at 245. The district court noted that Srpska is a "military faction" and does not constitute a state. *Karadzic v. Doe*, 866 F. Supp. 734, 741 (S.D.N.Y. 1994).

<sup>55</sup> *Kadic*, 70 F.3d at 245.

<sup>56</sup> *Id.*

<sup>57</sup> 28 U.S.C. § 1330 to 1602-11 (1988).

<sup>58</sup> See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 441-42 (1964) (White, J., dissenting).

<sup>59</sup> See *Kadic*, 70 F.3d at 245. Furthermore, the court did not share the district court's concerns that the Executive Branch may eventually recognize Karadzic as head of state, which would transform the case into a call for a nonjusticiable advisory opinion and strip the court of subject-matter jurisdiction. *Id.* at 248. Mere conjecture on the possibility of such an event should not be a part of the court's consideration. *Id.* (holding that "the mere possibility that Karadzic might at some future date be recognized by the United States as the head of state of a friendly nation and might thereby acquire head-of-state immunity does not transform the appellant's claims into a nonjusticiable request for an advisory opinion").

<sup>60</sup> 22 U.S.C. § 287 (1988).

<sup>61</sup> *Kadic*, 70 F.3d at 246-50. Because this case presents a host of interesting issues, this Note focuses discussion on the propriety of subject matter jurisdiction under the Alien Tort Act and the liability for non-state actors for law of nations violations. While important, discussion of service of process and the political question doctrine will be limited to their



On November 15, 1995, Karadzic submitted a petition for rehearing with the Second Circuit.<sup>62</sup> Karadzic's lawyers directed the court to a law review article written by Professor Joseph Sweeney, which was not previously cited by either of the parties.<sup>63</sup> The article asserted that the Alien Tort Statute was enacted only to cover one type of tort committed in violation of the law of nations—the unauthorized boarding of vessels which were believed to be aiding the enemy during wartime.<sup>64</sup> On January 4, 1996, the court denied the petition, noting that this narrow interpretation of the statute was neither compelling nor consistent with the broad reading of the Alien Tort Act espoused by the Second Circuit in *Filartiga v. Pena-Irala*.<sup>65</sup>

The Second Circuit's reinstatement of the appellant's claims of war crimes and genocide will certainly produce a wave of controversy among the international legal community and constitutional scholars. At the core of the controversy is the Alien Tort Act, and whether its recent revival has been justifiable or whether it has overstepped the bounds drawn for it over two centuries ago.

### III. Background Law

Part A of this section traces the historical origins and recent evolution of the Alien Tort Act, with special emphasis on the Second Circuit's landmark decision in *Filartiga v. Pena-Irala*.<sup>66</sup> Part B provides a brief overview of the law of nations and whether it has historically imposed liability on non-state actors.

#### A. The Alien Tort Act

The first alien tort provision was packaged as section 9 of the first Judiciary Act of 1789. It was later codified as 28 U.S.C. § 1350 and reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only committed in violation of the law of nations or a treaty of the United States."<sup>67</sup>

Since its inception in 1789, the Alien Tort Act has proved to be a riddle to federal courts.<sup>68</sup> One reason for all of the confusion in the courts is the absence of any legislative history specifically pertaining to

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impact on the Alien Tort Act.

<sup>62</sup> *Kadic v. Karadzic*, 74 F.3d 377 (2d Cir. 1996).

<sup>63</sup> Joseph Sweeney, *A Tort Only in Violation of the Law of Nations*, 18 HASTINGS INT'L. & COMP. L. REV. 445 (1995).

<sup>64</sup> *Id.* at 447.

<sup>65</sup> *Kadic*, 74 F.3d at 378.

<sup>66</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>67</sup> 28 U.S.C. § 1350 (1994). The statute recognizes two possible violations: violations of the law of nations and violations of U.S. treaties. *Id.* This Note focuses on the violations of the law of nations segment of the statute.

<sup>68</sup> See Jay M. Lewis Humphrey, Comment, *A Legal Lohengrin: Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F. L. REV. 105 (1979).

the original Alien Tort Claim provision.<sup>69</sup> Former United States Supreme Court Chief Justice Oliver Ellsworth, the principal drafter of the Judiciary Act, left little evidence of the committee's actual intent.<sup>70</sup> A survey of the political landscape at the time, however, provides many important clues as to why alienage jurisdiction was included in the Judiciary Act.<sup>71</sup> One of the principal fears of the early national government was that if the United States did not adequately adjudicate aliens' claims, it might provoke a foreign conflict with the aliens' home state.<sup>72</sup>

### 1. *Constitutional Origins*

A noted shortcoming of the early Articles of Confederation government was the inability of American courts to remedy wrongs committed against aliens while in the United States.<sup>73</sup> In fact, the law of nations during this period dictated that if a nation failed to redress a wrongful act against an alien, it would be accountable to the alien's home state.<sup>74</sup> Thus, the lack of an appropriate forum to redress injuries to an alien could perhaps escalate into an international crisis.<sup>75</sup>

The young nation's fears were confirmed during an altercation known as the Longchamps affair.<sup>76</sup> The Chevalier de Longchamps, a French adventurer of "obscure and worthless character,"<sup>77</sup> assaulted Francis Barbe Marbois, then-Consul General of France and Secretary of the French Legation.<sup>78</sup> The failure of the national government to remedy the act was thrust into the international spotlight as Longchamps was released on bail. Fortunately, Longchamps was finally brought to trial and convicted of a common-law crime in Pennsylvania. Longchamps was prosecuted by James Wilson,<sup>79</sup> who argued that Longchamps should be punished in order to "vindicate the honor of

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<sup>69</sup> Castro, *supra* note 1, at 495

<sup>70</sup> *Id.*

<sup>71</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 782-86 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985).

<sup>72</sup> *Id.*

<sup>73</sup> See Castro, *supra* note 1, at 494. Additionally, since state courts were given discretionary jurisdiction over suits involving aliens injured in America, the Continental Congress was concerned that, if the states refused to exercise jurisdiction, it could provoke retaliation from the alien's home state. *Tel-Oren*, 726 F.2d at 794 (Edwards, J., concurring).

<sup>74</sup> J. BRIERLY, *THE LAW OF NATIONS* 284-91 (6th ed. 1963).

<sup>75</sup> *Id.*; see also Humphrey, *supra* note 68, at 105, 113-15 (stating that "[a] private wrong by one person to an individual alien could escalate into an affront by one sovereign nation to another").

<sup>76</sup> Castro, *supra* note 1, at 491-93.

<sup>77</sup> *Id.* at 491.

<sup>78</sup> *Id.*

<sup>79</sup> James Wilson was one of the lesser-celebrated Founding Fathers and was urged to help his native Pennsylvania and its Attorney General convict de Longchamps. See generally PAGE SMITH, *JAMES WILSON, FOUNDING FATHER, 1742-1798*, 195-96 (1956).

Pennsylvania and [to assure] the safety of her citizens abroad."<sup>80</sup>

The same fears resurfaced as the drafters of the Constitution defined new national powers for the United States. The authors of the Federalist Papers repeatedly emphasized the need for a national voice in foreign relations.<sup>81</sup> Alexander Hamilton observed that "the union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it."<sup>82</sup> James Madison voiced his concern that the courts must be able to "prevent those violations of the law of nations and of treaties which if not prevented must involve us in the calamities of foreign wars."<sup>83</sup>

Thus, as the D.C. Circuit Court recently noted, "[a]s best we can tell, the aim of § 1350 was to place, in federal court, actions implicating foreign affairs."<sup>84</sup> Accordingly, it is highly likely that the drafters of section 9 of the Judiciary Act did not intend to address claims involving two aliens in foreign countries, since United States foreign affairs would not likely be implicated.<sup>85</sup> Even Oliver Ellsworth, in a letter to Jonathan Trumbell in 1796, stated his belief that the United States lacked legislative jurisdiction over actions taking place in foreign countries.<sup>86</sup>

## 2. Review of Case Law 1960 - 1980

The Alien Tort Act remained dormant through most of the nineteenth and early twentieth century. With the exception of one early case, *Bolchos v. Darrell*,<sup>87</sup> the federal courts rarely heard, and never upheld a claim brought under the Alien Tort Act until 1960.<sup>88</sup> Beginning in the mid-1900s, however, the Act began to resurface in the federal courts. By this time, the law of nations had evolved into a broad body of substantive law which was considerably different than it was at the time the Alien Tort Act was enacted.

As a result, federal courts began to read the statute differently in light of the various interpretations of the modern international law.<sup>89</sup>

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<sup>80</sup> 1 U.S. (1 Dall.) 111, 113 (1784).

<sup>81</sup> THE FEDERALIST No. 80 (Alexander Hamilton), No. 3 (John Jay).

<sup>82</sup> THE FEDERALIST No. 80 (Alexander Hamilton).

<sup>83</sup> Castro, *supra* note 1, at 494 (statement of James Madison).

<sup>84</sup> *Tel-Oren v. Libyan-Arab Republic*, 726 F.2d 774, 783 (D.C. Cir. 1984) (Edwards, J., concurring).

<sup>85</sup> See *id.* at 784 n.13; see also Castro, *supra* note 1, at 484 (stating that "[a]ctivities involving aliens in foreign countries stand on an entirely different footing").

<sup>86</sup> Castro, *supra* note 1, at 485 n.97.

<sup>87</sup> 3 F.Cas. 810 (D.S.C. 1795).

<sup>88</sup> *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).

<sup>89</sup> Compare *id.* (domestic law violations and passport violations actionable under the law of nations) with *Lopes v. Reederrei Richard Schroder*, 225 F. Supp. 292 (1963) (doctrine of unseaworthiness not a law of nations violation). See *Dreyfus v. Von Fink*, 534 F.2d 24, 30-31 (2d Cir. 1976) ("there has been little judicial interpretation of what constitutes the law of

Thus, any violation of the law of nations would be actionable under United States laws such as the Alien Tort Act. The federal courts, construing the Alien Tort Act in the context of 20th century law of nations principles, operated under the Supreme Court's directive in *The Paquete Habana* that the law of nations was a part of the law of the United States, and has been a part of our colonial heritage.<sup>90</sup>

Nevertheless, until 1980, federal courts were not the most hospitable forums for suits under the Alien Tort Act. In fact, until 1980, federal courts had only once, in 1960, affirmed jurisdiction under the Alien Tort Act for a violation of the law of nations.<sup>91</sup> The Second Circuit proved especially reluctant to use the Act to remedy law of nations violations.<sup>92</sup> In fact, the Second Circuit very narrowly construed the phrase "law of nations" when hearing cases involving the Alien Tort Act. For example, in *ITT v. Vencap*,<sup>93</sup> the Second Circuit,

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nations and no universally accepted definition of the phrase"). One court's oft-quoted formulation for deciphering law of nations violations under the Alien Tort Act included:

a violation by one or more individuals of those standards, rules or customs (a) affecting the relationship between states or between an individual and a foreign state, and (b) used by those state for their common good and/or in dealings interstate.

*Lopes*, 225 F. Supp. at 297.

<sup>90</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900) (stating that international law is part of the laws of the United States and should be administered by the courts); Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26 (1953) (arguing that "it is an ancient and salutary feature of the Anglo-American legal tradition that the Law of Nations is a part of the law of the land to be ascertained and administered, like any other, in the appropriate case."). But see A. Mark Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT'L. LAW 1 (1995), A. Mark Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1212-1233 (1988). Professor Weisburd provides significant criticism of the view that international law is part of the laws of the United States. He contends, *inter alia*, that neither our legal origins nor the early 19th century Supreme Court cases necessitate any such result. *Id.*

<sup>91</sup> *Adra v. Clift*, 195 F. Supp. 857 (D.Md. 1961). The other case in which jurisdiction had been granted under the Alien Tort Act was *Bolchos v. Darrel*, 3 F. Cas. 810 (D.S.C. 1795) (No. 1607). In *Adra*, the U.S. District Court in Maryland allowed jurisdiction for a claim brought by a Lebanese plaintiff, who alleged that his former wife took their child to the U.S. illegally under an Iraqi passport, concealed the child's true identity, and refused to return the child to his custody when she became nine years old as required by Muslim and Lebanese law. *Adra* 195 F. Supp. at 860-61. Despite an expansive reading of the statute with regard to a "tort committed in violation of the law of nations," the *Adra* court did, in fact, base part of its rationale on the statute's original purpose—to confer jurisdiction over suits implicating foreign affairs. *Id.* The court noted that the plaintiff was a citizen of a friendly country with long-standing foreign relations contacts, and that "the importance of foreign relations to our country today cautions federal courts to give weight to such considerations and not to decline jurisdiction given by an Act of Congress unless required to do so by dominant considerations." *Id.*

<sup>92</sup> See *infra* notes 93-98; see also, *Khedivial Line, S.A.E. v. Seafarers' Int'l Union*, 278 F.2d 49 (2d Cir. 1960) (holding that the court would not order seamen to stop picketing because plaintiffs had no right under international law to grant them relief); Farroq Hassan, *Panacea or Mirage? Domestic Enforcement of International Human Rights Law Into Domestic Law—U.S. Experience*, 4 HOUS. INT'L. L.J. 13, 17-18 (1981).

<sup>93</sup> 519 F.2d 1001 (2d Cir. 1975).

noting that the Alien Tort was "a kind of legal Lohengrin"<sup>94</sup> of unknown origins, refused to sustain jurisdiction for securities theft under the statute because "stealing" was not considered a violation of the law of nations.<sup>95</sup> Similarly, in *Dreyfus v. Von Finck*,<sup>96</sup> the court affirmed the district court's dismissal of claims by German citizens who alleged that the defendants wrongfully seized their property in violation of the law of nations.<sup>97</sup> Part of the rationale for the court's dismissal was that "violations of international law do not occur when the aggrieved parties are national of the acting state."<sup>98</sup>

### C. *The Filartiga Decision*

In 1980, the Second Circuit breathed new life into the Alien Tort Act with its expansive holding in *Filartiga v. Pena-Irala*.<sup>99</sup> The court held that a Paraguayan citizen could sue for acts of torture committed against him in Paraguay, by a Paraguayan official.<sup>100</sup> Neither United States citizens nor United States soil was involved in the case.

In upholding what can best be described as "worldwide jurisdiction,"<sup>101</sup> the court essentially by-passed any examination of the historical origins of the Alien Tort Act and its underlying purpose of

<sup>94</sup> Humphrey, *supra* note 68, at 105 n.3. Lohengrin was a mysterious mythical stranger in a medieval tale who eventually revealed himself as the son of Percival, keeper of the Holy Grail. *Id.*

<sup>95</sup> *Id.* at 105 (stating that "it is only where the nations of the world have demonstrated that the wrong is of mutual and merely several concern, by means of express international accords, that a wrong generally becomes recognized as an international law violation within the meaning of the statute.").

<sup>96</sup> 534 F.2d 24 (2d Cir. 1976).

<sup>97</sup> *Id.* at 25.

<sup>98</sup> *Id.* at 31 (citing *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 441-42 (1964) (White, J., dissenting); *Salimoff & Co. v. Standard Oil Co.*, 186 N.E. 679 (N.Y. 1933).

<sup>99</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>100</sup> *Id.*

<sup>101</sup> "Worldwide jurisdiction" is a term that refers to when U.S. domestic courts hear cases arising out of foreign nations and involving foreign citizens or governments. One should be careful not to confuse such jurisdiction with "universal jurisdiction," a term used in international law to describe domestic jurisdiction over certain crimes for which ordinary jurisdictional rules do not apply. The traditional concept of universal jurisdiction centered on the pirate as a *hostis humani generis*—an enemy of all mankind who loses his national character and may be brought to justice anywhere. Castro, *supra* note 1, at 486. Crimes of universal jurisdiction are extremely few (piracy, possibly war crimes, and genocide) and are distinguished from a larger list of "recognized" law of nations violations. Compare Restatement of the Foreign Relations Law of the United States § 404 (1987) with *id.* at § 702. The doctrine, however, is unsettled, because no consensus exists as to its current scope. Worldwide jurisdiction simply describes the federal court's notion that any of the law of nations violations alleged from the larger list in a § 1350 action is enough to permit the courts to assert jurisdiction worldwide. The courts have not required that the violation be a crime that warrants "universal jurisdiction," probably because of the lack of consensus existing on the matter. Even the courts which have attempted to use the concept of universal jurisdiction have been inconsistent with its application. For instance, in *Filartiga*, the court described the torturer as *hostis humani generis* like the pirate, but still required a showing of state action that is inconsistent with the doctrine of universal jurisdiction.

ensuring peaceful foreign relations. Despite the historical evidence strongly suggesting that Congress intended to use the Alien Tort Act as a tool to *prevent* foreign affairs controversies, the court focused less on the underlying intent of the statute and more on whether there was "a tort was committed in violation of law of nations."<sup>102</sup> The *Filartiga* court ruled that "the constitutional basis for the Alien Tort Act is the Law of Nations, which has always been part of the federal common law."<sup>103</sup> Therefore, while United States foreign affairs may not have been directly implicated, the court ruled that the *law of nations* was implicated, and so the Alien Tort statute provided an appropriate forum for the dispute.<sup>104</sup>

The *Filartiga* court construed the law of nations, according to the principles originally laid out by the Supreme Court in *United States v. Smith*.<sup>105</sup> "The law of nations may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law."<sup>106</sup> The court cited an extensive array of authority, such as the U.N. Declaration of Human Rights<sup>107</sup> and the Universal Declaration Against Torture,<sup>108</sup> which proclaimed that torture was now prohibited by the law of nations.<sup>109</sup> Further, the court stated that under modern principles of the law of nations, a state's treatment of its own citizens was a matter of grave international concern.<sup>110</sup> Thus, federal courts could hear properly alleged violations of the law of nations regardless of where the alleged tort was committed.<sup>111</sup>

The court's holding explicitly overruled its earlier dicta in *Dreyfus v. Von Finck*, that law of nations violations do not occur "when the aggrieved parties are nationals of the acting state."<sup>112</sup> The court characterized the language in *Dreyfus* as "clearly out of tune with the current usage and practice of international law," and stated that the law of nations "confers fundamental rights upon people vis-a-vis their own governments."<sup>113</sup>

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<sup>102</sup> *Filartiga*, 670 F.2d at 876.

<sup>103</sup> *Id.* at 885.

<sup>104</sup> *Id.* at 878-84.

<sup>105</sup> 18 U.S. (5 Wheat.) 153 (1820).

<sup>106</sup> *Id.* at 160-61.

<sup>107</sup> Universal Declaration of Human Rights, General Assembly Resolution 217 (III) (A) (Dec. 10, 1948).

<sup>108</sup> Declaration on the Protection of All Persons from Being Subjected to Torture, G.A. 3452, 30 U.N.Doc. A/1034 (1975).

<sup>109</sup> *Id.* "[S]everal commentators have concluded that the Universal Declaration has become, in toto, a part of binding, customary international law." *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980) (citing Nayar, *Human Rights: The United Nations and United States Foreign Policy*, 19 HARV. INT'L L.J. 813, 816-17 n.18 (1978)).

<sup>110</sup> *Filartiga*, 630 F.2d at 881.

<sup>111</sup> *Id.* at 885 (citing *Mostyn v. Fabrigas*, 1 Cowp. 161 (1774)).

<sup>112</sup> *Dreyfus v. Von Finck*, 534 F.2d 24, 31 (2d Cir.), *cert. denied*, 429 U.S. 835 (1976).

<sup>113</sup> *Filartiga*, 630 F.2d at 885.

*Filartiga* opened up new doors for adjudicating international human rights abuses. The court in *Filartiga* re-interpreted the purpose of the Alien Tort Act to provide a forum for redressing any tortious law of nations violations committed against any alien, without regard to the nationality of the defendant or the place of the violation.<sup>114</sup> As the Second Circuit would note seven years later in a decision based largely upon *Filartiga*, "[t]he evolving standards of international law govern who is within the statute's jurisdictional grant as clearly as they govern what conduct creates jurisdiction."<sup>115</sup>

Not all judges, however, rushed to embrace the Second Circuit's expansive reading of the Alien Tort Act. In 1985, the D.C. Circuit Court of Appeals handed down *Tel-Oren v. Libyan Arab Republic*.<sup>116</sup>, the first significant Alien Tort Act decision in the wake of *Filartiga*. In *Tel-Oren*, the three-judge panel dismissed claims brought by survivors of those murdered by a PLO attack on a civilian bus in Israel.<sup>117</sup> The dismissal was the only thing the three judges, Judge Edwards, Judge Bork and Senior Judge Robb, could agree on, as each wrote a separate concurrence based on completely different rationales.<sup>118</sup> Judge Edwards' concurrence in *Tel-Oren* accepted *Filartiga* as binding, albeit, narrow precedent. While *Filartiga* mandated that torture be committed by a state actor, Edwards could not justifiably characterize the PLO as a recognized state.<sup>119</sup> Judge Edwards expressed a deep concern with *Filartiga*'s use of international law to determine standards of liability under the Alien Tort statute.<sup>120</sup> Judge Edwards also expressed concern over extending jurisdiction to suits involving two aliens, since it could provoke the same types of foreign relations crises that the statute was intended to prevent.<sup>121</sup> Judge Bork's opinion flatly rejected *Filartiga* on the basis that § 1350 gives plaintiffs no "right to sue," and such expansive jurisdiction violated separation of powers principles, which ignored the original intent of the Framers.<sup>122</sup> Judge Robb dismissed the actions as "nonjusticiable."<sup>123</sup>

In 1989, the Supreme Court added a major wrinkle in Alien Tort

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<sup>114</sup> See *Id.*

<sup>115</sup> *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987), *rev'd on other grounds*, 488 U.S. 428 (1989).

<sup>116</sup> 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (1985).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 776 (Edwards, J., concurring).

<sup>120</sup> *Id.* at 781 (Edwards, J., concurring). Judge Edwards instead proposes an alternative formulation for determining the standard of liability. His approach, similar to the one used in *Adra v. Clift*, required a pleading of a violation of both municipal and international law, but used municipal law as the standard of liability. Judge Edwards believed this approach to provide a much more workable standard for the courts to follow. *Id.* at 781-91.

<sup>121</sup> *Id.* at 784 n.13.

<sup>122</sup> *Id.* at 801-23.

<sup>123</sup> *Id.* at 823-27.

Act's jurisdictional analysis. In *Argentine Republic v. Amaredda Hess Shipping Corp.*,<sup>124</sup> the Court held that the Foreign Sovereign Immunities Act (FSIA) would trump the Alien Tort Act as a means of determining jurisdiction in federal courts.<sup>125</sup> The FSIA would therefore become the sole basis for obtaining jurisdiction over a foreign state.<sup>126</sup> This holding would seem to have a chilling effect on *Filartiga's* expansion of the Alien Tort Act, especially in cases where a plaintiff is pursuing law of nations violations against states for mistreatment of their own citizens.

At least one federal court, however, has astutely maneuvered around the FSIA in an Alien Tort Act case. In *In re Estate of Ferdinand E. Marcos Human Rights Litigation*,<sup>127</sup> the Ninth Circuit asserted jurisdiction over a claim by a Philippine mother that her son had been kidnapped, interrogated, and tortured to death by Philippine military personnel controlled by Marcos's daughter, Imee Marcos-Mantoc.<sup>128</sup> The court found that there was no jurisdiction under the FSIA because Marcos-Mantoc admitted to acting on her own authority rather than under the authority of the Republic of the Philippines.<sup>129</sup> Thus, the court found that Marcos-Mantoc could be tried under the Alien Tort Act as a state official.<sup>130</sup>

The court reaffirmed *Filartiga's* premise that the Alien Tort Act may be used to remedy any violation of the law of nations, no matter where it occurred or who the parties were. In fact, the court explicitly stated that it "did not share"<sup>131</sup> Marcos' concern that, "contrary to the original purpose behind § 1350, to permit cases of this sort would invite, rather than avoid, controversy with foreign nations."<sup>132</sup> The court felt that there were other devices to quell potential foreign relations problems, although none were present in *Marcos-Mantoc*.<sup>133</sup>

Led by the new guideposts staked out in *Filartiga*, the federal courts have recently revitalized the Alien Tort Act. In doing so, courts have concentrated their focus on whether the plaintiffs simply have alleged a recognized violation of the law of nations.<sup>134</sup> If so, then the courts have been willing to exercise jurisdiction irrespective of where

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<sup>124</sup> 488 U.S. 428 (1989).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> 978 F.2d 493 (9th Cir. 1992).

<sup>128</sup> *Id.* at 495-96.

<sup>129</sup> *Id.* at 497-98.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 500.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* The court noted that even if statutory limitations such as the FSIA are not available, other judicial limitations such as forum non conveniens and venue restrictions will usually be available. *Id.*

<sup>134</sup> *Filartiga, v. Pena-Irala*, 630 F.2d 876, 878-85 (2d Cir. 1980).



the act was committed or who committed it.<sup>135</sup>

*B. Liability of State Actors for Violations of the Law of Nations*

The *Filartiga* threshold test for jurisdiction under the Alien Tort Act hinged on whether the plaintiff pleaded a recognized law of nations violation.<sup>136</sup> If so, § 1350 opened the door to the federal courts. But *Filartiga* held that the law of nations imposed liability only for torture caused by state actors.<sup>137</sup> The question was left open as to whether other law of nations violations—such as war crimes, genocide and other international human rights violations—might apply to non-state actors as well.<sup>138</sup>

For a rule to become part of the law of nations, however, it must command the “general assent of civilized nations.”<sup>139</sup> This requirement was intended to be a strict one.<sup>140</sup> Whether certain violations of the law of nations applies to non-state actors, therefore, turns on whether non-state actor liability has become a recognized norm within the law of nations.

The law of nations covered a markedly different landscape in the eighteenth century than it does today. Blackstone described the law of nations as “a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.”<sup>141</sup> In the nineteenth century, Justice Story similarly surmised that “the law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world.”<sup>142</sup> While some scholars noted that the early law of nations was to be a “universal law binding upon all mankind,”<sup>143</sup> Blackstone enumerated three major violations of international law: violations of safe conducts, infringements on the rights of ambassadors, and piracy.<sup>144</sup>

Most importantly, however, the law of nations in the 18th century

<sup>135</sup> *Id.* at 885-89.

<sup>136</sup> *Id.* at 878.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 880 (quoting *The Paquete Habana*, 175 U.S. 677, 694 (1900)).

<sup>140</sup> *Id.* The court stated “Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others in the name of applying international law”. *Id.*

<sup>141</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES 66 (1954).

<sup>142</sup> *The Prize Cases*, 67 U.S. 635, 670 (1865). The Prize cases are better-known for granting President Lincoln the Constitutional authority to take action as Commander-in-Chief against the southern states in rebellion, on the grounds that a state of war in fact existed, and had been ratified, despite the fact that the Union had not officially declared war. *Id.*

<sup>143</sup> Edwin D. Dickinson, *The Law of Nations as Part of the National Law of the United States*, 101 U. PA. L. REV. 26, 26-27 (1952) (citing Dumbauld, *Hugo Grotius: The Father of International Law*, 1 JOURNAL OF PUBLIC LAW 117, 118-26 (1952)).

<sup>144</sup> 4 BLACKSTONE at 66. See also, *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1985) (Bork, J., concurring).

was clearly binding on individuals as well as states.<sup>145</sup> In fact, an analysis of early United States case law finds examples of non-state actor liability for each of Blackstone's enumerated offenses.<sup>146</sup> Prior to *Filartiga*, the only two cases in which § 1350 had been upheld involved law of nations violations committed by non-state actors.<sup>147</sup>

The recent § 1350 cases, however, have followed *Filartiga*'s reasoning that when construing the law of nations, one must interpret it "not as it was in 1789, but as it has evolved and exists among the world today."<sup>148</sup> Modern international law, "as it exists in the world today" was formed largely in response to the horrors exposed after the First and Second World Wars and is still equivocal on the concept of individual liability.<sup>149</sup> While some commentators adamantly assert that individuals possess both rights and duties under the law of nations,<sup>150</sup> most courts have held fast to the belief that the law of nations does not impose duties upon individuals.<sup>151</sup>

War crimes and genocide represent two of the four acts which are firmly entrenched as international law violations subject to "unequivocal international condemnation."<sup>152</sup> Some commentators have also attempted to list war crimes and genocide as acts to which "universal

<sup>145</sup> Dickinson, *supra* note 143, at 27 (stating that the law of nations was concerned somewhat indiscriminately with matters between individuals, between individuals and states, and between states); Jay M. Lewis Humphrey, Comment, A Legal Lohengrin, *Federal Jurisdiction Under the Alien Tort Claims Act of 1789*, 14 U.S.F. L. REV. 105, 112 (1979); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1206, 1224 (1988). Cf. *Tel-Oren*, 726 F.2d at 792 n.22 (Edwards, J., concurring) Judge Edwards argued that "[C]lassical international law was predominately stalest." *Id.* (citing J. BRIERLY, *THE LAW OF NATIONS* (1963)).

<sup>146</sup> See, e.g., *Respublica v. Longchamps*, 1 U.S. (1 Dall.) 111, 117 (1784) (private individual liable for assault and battery of an ambassador); *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 163 (1820) (individual held liable for piracy); *Bolchos v. Darrell*, 3 F. Cas. 810, 814-15 (D.S.C. 1795) (No. 1607) (individual held liable under §1350 for violation of a treaty between France and the United States).

<sup>147</sup> *Bolchos*, 3 F. Cas. at 810; *Adra v. Clift*, 195 F. Supp. 857 (D. Md. 1961).

<sup>148</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

<sup>149</sup> *Id.*

<sup>150</sup> Jordan J. Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51, 51 (1992). Paust boldly asserts that there should be no debate as to whether private individuals have duties under the law of nations, especially with regard to human rights. He dismisses as erroneous all of the recent federal court decisions which state otherwise. *Id.* at 52-53.

<sup>151</sup> *Tel-Oren*, 726 F.2d at 791-96 (Edwards, J., concurring) The view supporting non-state actor liability "is not so widely accepted doctrinally or practically as to represent the consensus among nations." *Id.* However, Judge Scalia asserts that when the Alien Tort Act first appeared, it may have been intended to cover only private, nongovernmental acts. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 206-07 (D.C. Cir. 1985); *In Re Estate of Ferdinand E. Marcos Human Rights Litigation*, 978 F.2d 493, 501 (9th Cir. 1992). Some cases specifically hold that torture is not a violation for which non-state actors may be held liable. See, e.g., *Filartiga*, 630 F.2d at 889-90; *Linder v. Portocarrero*, 747 F. Supp. 1452, 1462 (S.D. Fla. 1990).

<sup>152</sup> *Id.* at 791 n. 20.

jurisdiction" attaches.<sup>153</sup> In the international law context, universal jurisdiction attaches to certain crimes which are so heinous that the international community seeks to punish the offenders wherever they may reside and their liability follows them everywhere.<sup>154</sup> The doctrine is synonymous with the concept of *hostis humani generis*, and therefore applies to the pirate and the slave trader.<sup>155</sup> The law is unsettled, however, and well short of a consensus, as to whether war criminals and genocidists fall into this category. The question that American courts had not had a chance to address before *Kadic* was whether war crimes and genocide are acts for which non-state actors may be held liable — or perhaps more importantly, whether the law of nations ever meant to distinguish between state and non-state actors for such evil and universally deplored acts.

War crimes and genocide were among the horrors exposed during World War II and were painfully recounted during the Nuremberg Trials. War crimes, codified largely in the Geneva Conventions, are generally described as barbaric acts committed during hostilities and have continually been condemned by international law as offenses against the law of war.<sup>156</sup> "Genocide" was coined in 1944 by Raphael Lemkin, a member of the American prosecution staff at Nuremberg.<sup>157</sup> Genocide had been present in many atrocious forms throughout human history, but it was the massive extinction of hundreds of thousands of Jews in Germany and Poland that finally sent shock waves throughout the civilized world and brought genocide into the forefront of the international human rights movement.<sup>158</sup> The international community responded by drafting the Convention on the Prevention and Punishment of Genocide, which was enacted into law in over 100 countries.<sup>159</sup>

<sup>153</sup> Castro, *supra* note 1, at 486. LYAL S. SUNGA, *INDIVIDUAL LIABILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS* 103 (1992); *See also supra* note 101.

<sup>154</sup> *See* Sunga, *supra* note 153.

<sup>155</sup> *Id.*; *see also* Blum & Steinhardt, *supra* note 1, at 62-64.

<sup>156</sup> *In re Yamashita*, 327 U.S. 1, 14 (1946); *see generally*, Telford Taylor, *THE ANATOMY OF THE NUREMBERG TRIALS*, 1-20 (1992) (thorough account of the historical evolution of war crimes, citing numerous historical codifications on the laws of war).

<sup>157</sup> Taylor, *supra* note 155, at 102. Lemkin defined genocide as "the extermination of racial and national groups." *Id.*; *see also*, WARREN FREEDMAN, *GENOCIDE: A PEOPLES WILL TO LIVE* 11-14 (1992). Genocide is a word derived from two Latin roots, "genos" meaning family or clan and "occido" meaning extermination. *Id.* at 11. Before Lemkin coined the phrase, genocide was literally an anonymous crime. In a 1940 radio broadcast, Winston Churchill was forced to describe the horrors committed by the Nazis in Poland as a "crime without a name." *Id.* The Nuremberg Tribunal, however, rejected this term and used "crimes against humanity" instead. *Id.*

<sup>158</sup> *Id.* at 37-41.

<sup>159</sup> 78 U.N.T.S. 277, entered into force Jan. 12, 1951; U.N. GAOR U.N.Doc. A/810, p. 174 (1951). Over 100 states were parties to the agreement. The United States, however, was the last of the over one hundred nations to ratify the agreement. It finally did so almost forty years later on February 19, 1986. For an enlightening discussion on the history of the ratification process and the reason that some U.S. conservative senators had cold feet for so

The *Kadic* court was not the first court to assert jurisdiction over alleged international human rights offenders in foreign states. But the court was the first to extend the worldwide jurisdiction trumpeted in *Filartiga* to reach non-state actors for certain law of nations violations.<sup>160</sup>

#### IV. Analysis

This section analyzes the Second Circuit's treatment of two major issues arising out of the *Kadic* cases. The first issue addresses the crux of the *Kadic* decision: whether certain violations of the law of nations impose liability regardless of state action.<sup>161</sup> The second issue is whether "worldwide jurisdiction" is proper under § 1350. This issue involves a brief critique of *Filartiga* and challenges future courts to remain true to the historical purpose of § 1350.<sup>162</sup> Additionally, this section discusses some of the practical problems with United States courts hearing politically sensitive cases arising outside of its jurisdiction.<sup>163</sup>

##### A. Pushing *Filartiga* Even Further

*Filartiga* made its stopping point clear. It limited the Alien Tort Act's jurisdiction over torture claims to those against state actors.<sup>164</sup> The issue that ultimately crystallized in *Kadic* was whether § 1350 jurisdiction applies to non-state actors for other law of nations violations, such as war crimes and genocide.<sup>165</sup>

The *Kadic* court ruled that, unlike torture, liability for genocide and war crimes should be binding on both state actors and non-state actors.<sup>166</sup> While there may be no consensus as to whether non-state actor liability should attach to every law of nations violation,<sup>167</sup> the court believed that there was a consensus that liability should attach to both war crimes and genocide, without regard to whether the

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long, see WARREN FREEDMAN, *A PEOPLE'S WILL TO LIVE* at 155-205 (1992); see also LAWRENCE J. LEBLANC, *THE UNITED STATES AND THE GENOCIDE CONVENTION* (1991).

<sup>160</sup> *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

<sup>161</sup> See *infra* notes 164-204.

<sup>162</sup> See *infra* notes 205-32.

<sup>163</sup> See *infra* notes 233-39.

<sup>164</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980).

<sup>165</sup> *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995).

<sup>166</sup> *Id.* at 244.

<sup>167</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 792-94 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985); Compare Jordan Paust, *The Other Side of Right: Private Duties Under Human Rights Law*, 5 HARV. HUM. RTS. J. 51 (1992) ("it should be beyond doubt that private individuals can have duties under treaty-based and customary international law") with Brownlie, *The Place of the Individual in International Law*, 50 VA. L. REV. 435 (1964) (stating that there is a long way to go to establishing private duties under international law).

perpetrators were "state actors."<sup>168</sup>

The court analyzed several recognized international authorities and found no evidence that liability for war crimes or genocide should be restricted to state actors.<sup>169</sup> The court noted that The Convention on the Prevention and Punishment of the Crime of Genocide<sup>170</sup> described genocide as an "odious scourge," from which mankind must be liberated.<sup>171</sup> It plainly states that "[p]ersons committing genocide . . . shall be punished whether they are Constitutionally responsible rulers, or private individuals."<sup>172</sup> This broad sweep of liability clearly applies to all individuals, not just those acting under constitutionally responsible rulers, as some might suggest.<sup>173</sup> The Genocide Convention Implementation Act of 1987,<sup>174</sup> also cited by the court, imposes criminal liability without regard to the status of the offender. Furthermore, the Restatement and other commentators support the court's conclusion that non-state actors may be liable for genocide.<sup>175</sup>

As noted earlier, war crimes were universally condemned by the international community at the Geneva Conventions.<sup>176</sup> The *Kadic* court noted that the four Geneva Conventions codified the laws of war and prohibited all forms of war crimes.<sup>177</sup> In particular, common article 3, which is almost the same in all four of the Geneva Conventions, binds "all parties" to a conflict from committing various acts which constitute war crimes.<sup>178</sup> The court read common article 3 as authority which binds "parties to internal conflicts regardless of whether they are recognized nations or roving hordes of insurgents."<sup>179</sup>

Moreover, the United Nations' recent enactment of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law in the Former Yugoslavia<sup>180</sup> simply

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<sup>168</sup> *Kadic*, 70 F.3d at 244. The court stated "[i]t suffices to hold at this stage that the alleged atrocities are actionable under the Alien Tort Act, without regard to state action, to the extent that they were committed in pursuit of genocide or war crimes." *Id.*

<sup>169</sup> *Id.* at 241-43.

<sup>170</sup> 78 U.N.T.S. 277, entered into force Jan. 12, 1951; U.N. GAOR U.N.Doc. A/810, p. 174 (1951).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 280.

<sup>173</sup> *Kadic*, 70 F.3d at 244.

<sup>174</sup> 18 U.S.C. § 1091 (1988). The act was spearheaded by Senator William Proxmire, who was tired of U.S. foot-dragging on the issue of ratification and who had made over 3,000 speeches on the Senate floor. Freedman, *supra* note 154, at 158.

<sup>175</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987); Blum & Steinhardt, *supra* note 1, at 94; Paust, *supra* note 150, at 57.

<sup>176</sup> *Kadic v. Karadzic*, 70 F.3d at 241.

<sup>177</sup> *Id.* at 242.

<sup>178</sup> *Id.* at 242-43.

<sup>179</sup> *Id.*, 70 F.3d at 243.

<sup>180</sup> United Nations, Security Council, Resolution 827, The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law

refers to "any person" who commits international crimes, and therefore does not require that such person be a state actor.<sup>181</sup> One noted commentator, Professor Howard S. Levie, declared that "it is indisputable that . . . [the U.N. Tribunal] has been given jurisdiction to try individuals charged with violations of the provisions of international humanitarian law."<sup>182</sup> This most recent pronouncement of individual liability for war crimes provides additional support for the court's holding, and is directly on point since it is specifically designed to try war criminals like Karadzic for war crimes similar to those in *Kadic*.<sup>183</sup>

With regard to torture, the court found that there was sufficient authority stating that liability may only be imposed on state actors.<sup>184</sup> Both the 1991 Torture Victim Protection Act<sup>185</sup> and *Filartiga* require that the torturer be a state actor for liability to attach.<sup>186</sup> The court did not try and reconcile why liability for torture required state action while liability for war crimes and genocide did not.<sup>187</sup> One reason may be that the distinction between state-actor and non-state actor liability for war crimes and genocide is rather impractical. Since these acts often involve the "deliberate and systematic"<sup>188</sup> extinction of entire populations, it is hard to imagine any situation in which the international community would seek to limit or absolve liabilities for such actions.<sup>189</sup> Additionally, genocide is almost always the product of mass-organizational campaigns to exterminate a particular group or groups of people.<sup>190</sup> The international community probably does not foresee a group of private individuals waging an extermination campaign without the backing of some sort of governmental, rebel or military organization.

Though the *Kadic* court ruled that liability for acts of torture would require state action, it provided the district court with guidelines for determining Karadzic's status as a state actor. In perhaps the most strategic ruling in the opinion, the court ruled that in determining Srpska's status as a "state," the district court should use the international definition of "state," rather than relying on whether or not an entity

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Committed in the Territory of the Former Yugoslavia Since 1991, Art. 7, U.N. Document S/RES/827 (1993) [hereinafter U.N. Tribunal].

<sup>181</sup> *Id.*; see 1 MICHAEL P. SCHARF AND VIRGINIA MORRIS, AN INSIDER'S GUIDE TO THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 91-103 (1995). "Individual responsibility for unlawful behavior is the essence of criminal law" *Id.* at 91.

<sup>182</sup> Howard S. Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT'L L. & COM. 1 (1995).

<sup>183</sup> See Blum & Steinhardt, *supra* note 1, at 63-84.

<sup>184</sup> *Kadic v. Karadzic*, 70 F.3d 232, 243-44 (2d Cir. 1995).

<sup>185</sup> 28 U.S.C. § 1350 Note (Supp. V. 1994).

<sup>186</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

<sup>187</sup> *Kadic*, 70 F.3d at 244-45.

<sup>188</sup> Freedman, *supra* note 157, at 17.

<sup>189</sup> Sunga, *supra* note 153, at 35-36.

<sup>190</sup> Blum & Steinhardt, *supra* note 1, at 94.

such as Srpska has been recognized by the United States.<sup>191</sup> While United States law looks to the Executive Branch's determination as to whether an entity has been recognized as a "state,"<sup>192</sup> international law provides a much more lenient formulation of statehood.<sup>193</sup>

Under international law, a state is an entity which has "a defined territory and a permanent population, under the control of its own government, and that engages in, and has the capacity to engage in formal relations with other countries."<sup>194</sup> Furthermore, the Restatement explains that a territory which meets these requirements is a "state" regardless of whether it is officially recognized by other states.<sup>195</sup> The *Kadic* court held that the Bosnian-Serbian entity known as Srpska falls clearly under this definition since it has a President and legislature, as well as its own currency and has also entered into agreements with other governments.<sup>196</sup> Furthermore, it has carved out its own territory within Bosnia where it governs the populations that reside there.<sup>197</sup> Other courts have recognized this international standard for statehood as defined by international law,<sup>198</sup> even when they have not exclusively applied it.<sup>199</sup>

Moreover, the court noted a potential problem which could arise if an entity such as Srpska was defined according to official recognition or non-recognition by the United States.<sup>200</sup> Official recognition by the United States would allow Karadzic to avail himself of a number of official immunities, such as the head of state doctrine or the FSIA.<sup>201</sup>

However, if Srpska is not recognized by the United States, Karadzic would be a non-state actor and therefore could not be liable for acts of torture under the law of nations as interpreted by the federal courts in both *Filartiga* and *Tel-Oren*. Thus, requiring official recognition to

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<sup>191</sup> *Kadic*, 70 F.3d at 244-45.

<sup>192</sup> *National Petrochemical Company of Iran v. M/T Sholt* Leaf, 860 F.2d 551, 553 (2d Cir. 1988); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791 n.21 (D.C. Cir. 1985) (Edwards, J., concurring) (arguing that "[o]ur courts have in the past looked to the foreign policy of this nation, in particular to the recognition or non-recognition of a foreign government, to determine the applicability of a given legal doctrine.")

<sup>193</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201, cmt. b (1986).

<sup>194</sup> *Kadic*, 70 F.3d at 244 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1986); *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47 (2d Cir. 1991)).

<sup>195</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 201, cmt. b (1986).

<sup>196</sup> *Kadic*, 70 F.3d at 245.

<sup>197</sup> *Id.*

<sup>198</sup> *Klinghoffer*, 937 F.2d at 47; *National Petrochemical Company of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir. 1988).

<sup>199</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 791 n.21 (D.C. Cir. 1984) (Edwards, J., concurring), *cert. denied*, 470 U.S. 1003 (1985) ("it is conceivable that a state not recognized by the United States is a state as defined by international law and therefore bound by international law responsibilities.").

<sup>200</sup> *Kadic*, 70 F.3d at 245.

<sup>201</sup> *See Lafontant v. Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994).

hold Karadzic liable as a "state actor" would provide a permanent shield from liability.<sup>202</sup> Judge Newman maintained that this result would be "perverse,"<sup>203</sup> and thus chose the more flexible international definition of state to determine state action.<sup>204</sup> Under the international formulation, the Executive Branch can refuse to recognize states without fearing that non-recognition would preclude federal courts from imposing liability over international criminals from that state.

### *B. Reigning In Worldwide Jurisdiction*

#### *1. Filartiga vs. The Framers*

In the first sentence of his opinion, Judge Newman admits that "[m]ost Americans would probably be surprised to learn that victims of atrocities committed in Bosnia are suing the leader of the insurgent Bosnian-Serb forces in a United States District Court in Manhattan."<sup>205</sup> This statement crystallizes the concept of worldwide jurisdiction and impliedly concedes that the reach of American courts into foreign countries may be excessive. The issue for the court was whether such an intrusion was authorized by such an antiquated statute which had been dormant for nearly two hundred years.<sup>206</sup>

Armed with *Filartiga* and the backing of the Executive Branch,<sup>207</sup> the court omitted any discussion on the appropriateness of exercising "worldwide" jurisdiction in this case and instead relied exclusively on the *Filartiga* formulation.<sup>208</sup> *Filartiga* and its offspring<sup>209</sup> provide well-established precedent that federal courts have jurisdiction for a recognized law of nations violation committed against any alien anywhere in the world.<sup>210</sup> Despite its precedential authority, *Filartiga* never confronts the historical evidence pointing out the real purpose of the original § 1350: to allow aliens to bring suits in U.S. federal courts in order to avoid a foreign conflict with the alien's home state.<sup>211</sup> Allowing worldwide jurisdiction over aliens' claims in today's highly politicized international community might often trigger the

<sup>202</sup> *Kadic*, 70 F.3d at 245.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 236.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 239-40.

<sup>208</sup> *Id.* at 238-39; see *Filartiga v. Pena-Irala*, 630 F.2d 876, 885-87 (2d Cir. 1980).

<sup>209</sup> *In re Estate of Ferdinand E. Marcos Litig.*, 978 F.2d 493 (9th Cir. 1992); *Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 425 (2d Cir. 1987); *rev'd on other grounds*, 488 U.S. 428 (1989); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass 1995); *Paul v Avril*, 812 F. Supp. 207 (S.D. Fla. 1993).

<sup>210</sup> *Kadic*, 70 F.3d at 236. ("[*Filartiga*] . . . validly creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations.")

<sup>211</sup> See *infra* note 213 and accompanying text.



opposite effect of instigating such conflict.<sup>212</sup>

It is clear from the courts, commentators, and the Framers that the prevention of a foreign crisis was an underlying motivation behind § 1350.<sup>213</sup> The Longchamps affair and other instances of unredressed acts against aliens during the pre-Constitution era made it clear to the Framers that their inability to properly adjudicate aliens' claims might give rise to unwanted international tensions.<sup>214</sup> Hamilton summarized these sentiments most eloquently in the Federalist No. 80:

A denial or perversion of justice by the sentence of the courts, as well as in any other manner is with reason classed among the just causes of war, it will follow that the federal judiciary ought to have cognizance of all causes in which the citizens of other countries are concerned.<sup>215</sup>

The Framers were therefore only concerned with redressing acts for which the United States would be held accountable—namely, those acts committed against aliens by U.S. citizens or on U.S. soil.<sup>216</sup> If, on the other hand, neither U.S. citizens nor soil is involved, then a foreign nation would have no reason to look to the United States for proper adjudication of a dispute, and therefore no foreign conflict

<sup>212</sup> See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812 (D.C. Cir. 1985) (Bork, J., concurring), cert. denied, 470 U.S. 1003 (1985).

<sup>213</sup> *Tel-Oren*, 726 F.2d at 782 (D.C. Cir. 1984) (stating "the intent of this section was to assure aliens access to federal courts to vindicate any incident which, if mishandled by a state court, might blossom into an international crisis"); Jay M. Lewis Humphrey, Comment, *A Legal Lohengrin, Federal Jurisdiction Under the Alien Tort Claims Act*, 14 U.S.F. L. REV. 105, 112 (1979) (arguing that "[i]t was precisely to avoid such damage to foreign relations that the ATCA was enacted"); Debra A. Harvey, Note, *The Alien Tort Statute: International Watchdog or Simply 'Historical Trivia'?*, 21 J. MARSHALL L. REV. 341, 343 (1988) (contending that "the framers recognized that the world community would hold the national government accountable for the actions of American citizens"); E. Hardy Smith, Note, *Federal Jurisdiction Under the Alien Tort Claims Act: Can this Antiquated Statute Fulfill Its Modern Role?*, 27 ARIZ. L. REV. 437, 444 n.49 (1985) (stating "[t]he drafters were therefore justifiably concerned that an alien's unredressed claim might develop into an international confrontation"); see also *Adra v. Clift*, 195 F. Supp. 857, 865 (D.Md. 1961) (explaining that "the importance of foreign relations to our country today" warrants the exercise of jurisdiction over an alien from a friendly country who seeks to have his daughter returned to him from the United States where she was wrongfully taken in violation of the law of nations"); *In re Estate of Marcos*, 978 F.2d 493 (9th Cir. 1992) (court implicitly acknowledged, but dismissed defendant's argument that federal courts hearing "foreign" cases would hurt, not help U.S. foreign relations).

Though no official legislative history is available, the historical evidence surrounding the Judiciary Act has proved to be compelling evidence for uncovering the statute's purpose. Judge Edwards traced and relied on the historical underpinnings of § 1350 in formulating his concurrence in *Tel-Oren*. *Tel-Oren*, 726 F.2d at 782-783 (Edwards, J., concurring). Professor Castro, in his exhaustive analysis of § 1350, maintains that "notwithstanding frequent complaints about the obscurity of § 1350's origins, a thorough study of available historical materials provides a fairly clear understanding of the statute's purpose." Castro, *supra* note 1, at 488. Despite historical evidence as to the original purpose of § 1350, no court has ever denied jurisdiction on this basis alone.

<sup>214</sup> Castro, *supra* note 1, at 488-94.

<sup>215</sup> THE FEDERALIST No. 80 (Alexander Hamilton).

<sup>216</sup> *Tel-Oren*, 726 F.2d at 783 (Edwards, J., concurring).

would emerge.<sup>217</sup>

The federal courts' use of § 1350 to assert jurisdiction between actions between two aliens for acts committed on foreign soil, is *completely at odds* with the statute's underlying goal of promoting and maintaining peaceful foreign relations.<sup>218</sup> Asserting worldwide jurisdiction in such a situation is likely to provoke the very type of conflict the statute hoped to prevent. Judge Bork remarked that

[f]or a young weak nation, one anxious to avoid foreign entanglements and embroilment in Europe's disputes, to undertake casually and without debate to regulate the conduct of other nations and individuals abroad, conduct without an effect upon the interests of the United States, would be a piece of breathtaking folly—so breathtaking as to render incredible any reading of the statute that produces such results.<sup>219</sup>

It is clear that when a federal court seeks to regulate the activities of foreign citizens or governments which occur in foreign states, it is almost certain that such actions will provoke resentment and possibly retaliation from the foreign state.<sup>220</sup> Since such a result flies directly in the face of the statute's original intent, it is difficult to understand why *Filartiga* and its supporters have ignored this problem. *Filartiga* stressed the importance of reading the law of nations clause of § 1350 as it stands today rather than as it stood in 1789. But even if § 1350 is read to include the evolution of new violations (e.g. torture), its purpose would still only authorize jurisdiction over these new violations when necessary to avoid foreign conflicts.

The *Kadic* court felt that its reliance on *Filartiga* was both justified and mandated by precedent. In its denial of defendant's petition for rehearing, the court stated that "[w]e have neither the authority nor the inclination to retreat from . . . [*Filartiga's*] ruling."<sup>221</sup> In relying on *Filartiga's* assertion of worldwide jurisdiction, the Second Circuit was securely in step with the recent pronouncements of all three branches of government and judicial thought.<sup>222</sup> Both Congress and the Executive have consistently adhered to *Filartiga's* jurisdictional scope. In 1992, Congress passed the Torture Victim Protection Act (TVPA).<sup>223</sup> The TVPA legislative history provides the most conclusive evidence that Congress intended for federal courts to use § 1350 to remedy certain law of nations violations no matter where they occur. The legislative history states that the clarification was necessary in light

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<sup>217</sup> See *id.* (stating that "[t]he focus of attention, then, was on actions occurring within the territory of the United States, or perpetrated by a U.S. citizen, against an alien.").

<sup>218</sup> See *id.* at 812 (Bork, J., concurring).

<sup>219</sup> *Tel-Oren*, 726 F.2d at 821 (Bork, J., concurring).

<sup>220</sup> Smith, *supra* note 213, at 449-50.

<sup>221</sup> *Kadic v. Karadzic*, 74 F.3d 377, 378 (2d Cir. 1996).

<sup>222</sup> See, e.g., *supra* notes 209-10 and accompanying text.

<sup>223</sup> 28 U.S.C. § 1350 Note (Supp. V. 1992).

of Judge's Bork's controversial concurrence in *Tel-Oren*.<sup>224</sup>

The Executive Branch also supported the plaintiffs' claims in both *Filartiga* and *Kadic*, urging for an expansive reading of § 1350.<sup>225</sup> Since worldwide jurisdiction necessarily implicates foreign affairs where Congress and the President are the primary actors, support from the Executive branch alleviates many Constitutional concerns about the role of the courts in foreign affairs. With the support of the Executive, the *Kadic* court did not have to assume the risk that its decision might result in multiple or contradictory pronouncements with regard to United States foreign policy.<sup>226</sup>

It is the *Kadic* court's blind reliance on *Filartiga* that is more troubling. The *Kadic* court ignored the rather compelling dicta in the well-researched concurrences of the *Tel-Oren* judges.<sup>227</sup> In *Tel-Oren*, both Judge Edwards and Judge Bork delved deep into the historical quagmire surrounding § 1350 and stressed its essential use as a device to quash potential foreign relations conflicts.<sup>228</sup> Judge Edwards even derived an alternative formulation of *Filartiga* which he felt more adequately addressed and met the historical intent of the statute,<sup>229</sup> while Judge Bork's opinion noted that cases like *Filartiga* actually thwart the original purpose of the statute.<sup>230</sup> Judge Bork specifically calls attention to the Framers' well-publicized fear of unwanted foreign entanglements and contends that an assertion of jurisdiction in cases like *Filartiga* will actually serve to realize those fears.<sup>231</sup> In light of the compelling historical evidence surrounding the origins of the Alien Tort Act set forth by both Judge Edwards and Judge Bork,<sup>232</sup> it may be more appropriate for Congress to debate the propriety of such jurisdiction in the context of today's vastly different geopolitical landscape before courts continue to expand on decisions like *Filartiga*.

## 2. Prudential Concerns with Worldwide Jurisdiction

Besides the historical evidence suggesting that § 1350 might not authorize worldwide jurisdiction into the affairs and activities of foreign countries, there are more important prudential concerns when

<sup>224</sup> *Id.*; See also, H.R. REP. No. 367, 102d Cong., 2d Sess. 4 (1991), reprinted in 1991 U.S.C.C.A.N. 84, 84-87 (reflecting legislative history).

<sup>225</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 889 n.24 (2d Cir. 1980); *Kadic*, 70 F.3d at 239-40 (2d Cir. 1995).

<sup>226</sup> See, e.g., *Baker v. Carr*, 369 U.S. 186, 217 (1962).

<sup>227</sup> *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

<sup>228</sup> *Id.* at 782-91 (Edwards, J. concurring); *id.* at 812-816, 821-822 (Bork, J., concurring).

<sup>229</sup> *Id.* at 786-91 (Edwards, J., concurring). Most importantly, Judge Edwards admits in note 18 that he had "some misgivings about the propriety of § 1350 actions between two aliens" under the *Filartiga* formulation. *Id.* at 786 n.18 (Edwards, J., concurring).

<sup>230</sup> *Id.* at 813 (Bork, J., concurring).

<sup>231</sup> *Id.* at 811-20 (Bork, J., concurring).

<sup>232</sup> See *supra* note 228; see also *supra* note 213 and accompanying text.

domestic courts exercise such jurisdiction. Even if jurisdiction is clearly authorized by Congress, it could produce logistical nightmares which could ultimately threaten the integrity of the federal courts. The *Kadic* court recognized that adjudicating its dispute may have an immediate impact on U.S. foreign affairs in Bosnia, especially regarding the defendant, Serb leader Radovan Karadzic.<sup>233</sup> The court acknowledged that the case might present a political question, but after further analysis, concluded that it did not.<sup>234</sup> The court noted that even the Executive Branch had suggested to the court that "although there might be instances in which federal courts are asked to issue rulings under the Alien Tort [Act] or [TVPA] that might raise political question, this is not one of them."<sup>235</sup>

The *Kadic* court, however, did not address some of the more basic procedural problems with worldwide jurisdiction that might occur when a United States court's jurisdiction expands worldwide. Some of these concerns were perhaps best expressed by Judge Robb in his brief but telling *Tel-Oren* concurrence.<sup>236</sup> Judge Robb was troubled by the complicated, if not impossible process of compelling the parties to attend, engaging them in a meaningful and successful hearing, and then the additional difficulty in sorting out individual responsibility within the highly-sensitive and politically-charged network of international crime.<sup>237</sup> Performing such tasks may out of reach for the federal judiciary. As Judge Robb reminds us,

It is one thing for a student note-writer to urge that the courts accept the challenges involved. It is an entirely different matter for a court to be asked to conduct such a hearing successfully. The dangers are obvious. To grant the initial access in the face of an overwhelming probability of frustration of the trial process as we know it is an unwise step.<sup>238</sup>

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<sup>233</sup> See *Kadic v. Karadzic*, 70 F.3d 232, 248-50 (2d Cir. 1995).

<sup>234</sup> *Id.* The court analyzed the applicability of the political question doctrine under the factors set forth in *Baker v. Carr*, 369 U.S. 186 (1962). The court concluded that since there was no real threat of the court's decision contradicting any prior decisions espoused by the other branches of government and since *Filartiga* had established judicial norms for proper adjudication of the dispute, the political question doctrine did not bar the court from hearing the case. *Id.*

<sup>235</sup> *Id.* at 250 (citing Statement of Interest of the United States at 3).

<sup>236</sup> *Tel-Oren v. Libyan-Arab Republic*, 726 F.2d 774, 823-24 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1003 (Robb, J., concurring).

<sup>237</sup> *Id.* (Robb, J., concurring).

<sup>238</sup> *Id.* at 823-24. (Robb, J., concurring) (citation omitted). The *Kadic* case exemplifies another procedural problem that may effect the integrity of the federal courts: service of process. In order to effectively serve process, the foreign defendants must come to the United States without the protection of certain available immunities. In this unlikely event, the court must then locate and properly serve the defendant. Though the court was able to serve the defendant Karadzic, such an event is a fortuitous anomaly. The string of contingencies that must occur in this scenario make it improbable that federal courts will ever properly assert personal jurisdiction over a foreign defendant. Further, the types of defendants who commit these acts are often those who lurk in the international underground. As Judge Robb notes, the complexities and raw danger inherent in such a search

Even when a defendant is properly served, tried and a judgment entered against him, there is the additional problem of under-enforcement. To this day, Dolly and Joel Filartiga have not received a cent of their judgment against Pena.<sup>239</sup> Thus, while the case provides important insight into judicial doctrine and has been the subject of several scholastic articles, it has little practical value. Even if the district court executes a judgment against Karadzic, it is unlikely that he will avail himself to U.S. officials so that they may enforce it.

## V. Conclusion

The Second Circuit made it clear that while torturers may escape liability in United States courts by posing as private, "non-state actors," genocidists and war criminals may not.<sup>240</sup> On its face, the *Kadic* case represents a significant breakthrough in establishing broader standards of liability for private individual conduct and should be championed by international human rights advocates. The more practical rule in the case, however, was that rebel or insurrectionist regimes such as Srpska can be classified as state actors within international law and thus will be more susceptible to liability for violating international law.<sup>241</sup> The more liberal definition of state status under international law as defined by the Restatement and U.S. courts will make it much easier to hold such leaders accountable for their actions in the future.<sup>242</sup>

The most important aspect of the *Kadic* case not fully addressed by the court involves the power of § 1350 to grant federal courts such expansive and intrusive jurisdiction into the affairs of foreign states. The applicability of the Alien Tort Act to pursue law of nations violations committed by aliens in their own countries was not a goal of the Framers in 1789 when the first Alien Tort provision was passed.<sup>243</sup> Most courts have at least recognized that a chief goal of the Framers was to use alienage jurisdiction to promote and ensure peaceful relations with foreign nations rather than to provoke potential conflicts.<sup>244</sup> Using §1350 to adjudicate law of nations violations which occur outside the United States and do not implicate U.S. citizens or foreign policy runs the risk of provoking conflict with the foreign state. It seems clear that this use of § 1350 would be clearly against the

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may be way beyond the reach or desires of the federal courts. *Id.*

<sup>239</sup> SUNGA, *supra* note 153, at 113 (indicating Pena-Irala simply returned to Paraguay where he was beyond the reach of U.S. law enforcement).

<sup>240</sup> *Kadic v. Karadzic*, 70 F.3d 232, 241-43 (2d Cir. 1995).

<sup>241</sup> *Supra* notes 194-204 and accompanying text.

<sup>242</sup> See *supra* notes 203-04 and accompanying text.

<sup>243</sup> See *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808-20 (D.C. Cir. 1985) (Bork, J., concurring).

<sup>244</sup> See *supra* note 213 and accompanying text.

Framers' original goals. If such an admittedly narrow and historical reading of the Alien Tort Act renders it practically useless for foreign plaintiffs seeking redress from human rights violations committed against them in their own countries,<sup>245</sup> then Congress should pass an updated statute that addresses the propriety of handling these politically sensitive cases which have the potential for creating potentially explosive foreign relations problems.

Congress may very well intend for the courts to provide a forum for aliens to obtain relief from the monstrous and murderous law of nations offenses such as war crimes, genocide and torture, even when they involve foreign citizens in foreign countries.<sup>246</sup> Thorough legislative debate is needed on this issue, however, and the federal courts should not continue to utilize the antiquated Alien Tort Act to bypass the need for a clear legislative pronouncement. Instead of manipulating the bare language of the ancient text of § 1350, the federal courts should encourage Congress to amend § 1350 to provide explicit authorization to adjudicate such claims.

Even if Acts of Congress authorize federal courts to exercise worldwide jurisdiction over certain acts committed in violation of the law of nations, there still exists a host of commentators who feel that such jurisdiction is not in the best interest of either U.S. foreign policy or the international community at large.<sup>247</sup> The logistical complications in these cases will ultimately challenge the integrity of U.S. courts. Problems with personal jurisdiction, while not present in the

<sup>245</sup> *Tel-Oren*, 726 F.2d 774 (Edwards, J., concurring). Judge Edwards claimed that Judge Bork's narrow interpretation of the statute would render it virtually a dead letter for addressing any violations of the law of nations. *Id.* This position is extreme since there have been several situations recently where § 1350 could be applied perfectly true to its original intent. The rash of violence perpetrated in Florida against foreign tourists continues to outrage the international community, particularly the home state of the victims. Certainly, they would expect their citizens to get civil relief in U.S. courts if they so desired, since the attacks were committed by American citizens in Florida. Alienage jurisdiction in this case would serve the Framers' desire to quell any potential dispute that would arise if American courts were powerless to hear such cases. Compare this scenario with one where a German tourist was tortured by a French citizen in France. Clearly, U.S. jurisdiction would take on an entirely new characteristic. It would be more intrusive than defensive because U.S. foreign relations are simply not implicated in the second case.

<sup>246</sup> See Torture Victim and Protection Act of 1991, 28 U.S.C. § 1350 (Note 1994).

<sup>247</sup> See, e.g., Farooq Hassan, *A Conflict of Philosophies: The Filartiga Jurisprudence*, 32 INT'L & COMP. L. Q. 250, 256-58 (1983). Hassan recognized problems with domestic courts trying to enforce international norms, especially when they involve acts committed in foreign nations. He argued that "[t]here is something to be said against the emergence of a jurisprudence which allows the domestic courts of one country to try, in actions for civil wrong, the citizens of another country for violations of international law." *Id.* at 256. See also, Castro, *supra* note 1, at 484. Castro maintains that "[i]f the United States is going to regulate the activities of citizens of foreign countries in their own countries . . . the plan of the Constitution surely counsels restraint." *Id.* In his conclusion Smith suggests that *Filartiga* type cases "might generate tension between the United States and foreign nations." E. Hardy Smith, *supra* note 213 at 450; see also SUNGA, *supra* note 153 at 111-13.

*Kadic* case,<sup>248</sup> will thwart the power of most federal courts which try and hear these cases in the future. The authority of U.S. courts will be further undermined if they undertake the tremendous task of bringing noted terrorists or ruthless dictators to judgment and fail to effectuate any meaningful outcome.

Thus, while cases like *Filartiga* provide fodder for law review analysis,<sup>249</sup> the practical value of these cases is minimal. In fact, their real value may be in convincing federal courts that even if worldwide jurisdiction may be authorized in some cases, it is ill-advised in most.<sup>250</sup>

As President Bush wrote when he signed the TVPA in 1992, "there is too much litigation at present even by Americans against Americans. The expansion of litigation by aliens against aliens is a matter that must be approached with prudence and restraint."<sup>251</sup> Maintaining the integrity of the federal courts, both at home and abroad, may be more worthwhile than chasing evasive defendants or empty judgments.

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<sup>248</sup> See *supra* note 28.

<sup>249</sup> See *supra* note 247; Blum & Steinhardt, *supra* note 1.

<sup>250</sup> Civil judgments are nearly impossible to collect once the defendant returns to his home state. See *supra* note 239 and accompanying text.

<sup>251</sup> 4 U.S. CODE CONG. AND ADMIN. NEWS 91 (102d Cong.) (Statement by President of the United States) (1992).

